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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re KIMBERLY G., a Person Coming
Under the Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

STEVEN G.,

Defendant and Appellant.

E035686

(Super.Ct.No. J103467)

OPINION

APPEAL from the Superior Court of Riverside County. Robert M. Padia,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Alice C. Shotton, under appointment of the Court of Appeal, for Defendant and
Appellant.

William C. Katzenstein, County Counsel, and Julie Koons Jarvi, Deputy County
Counsel, for Plaintiff and Respondent.

Robert W. Gehring, under appointment of the Court of Appeal, for Minor.

Steven G. (father) appeals from judgment terminating his parental rights to Kimberly G. under Welfare and Institutions Code section 366.26.¹ Father's sole contention on appeal is that the juvenile court erred in failing to find that the sibling bond exception to adoption applied under section 366.26, subdivision (c)(1)(E). We find no merit to father's argument.

FACTS AND PROCEDURAL BACKGROUND

In February 2002, Kimberly, then four years old, and her half-brothers, Ricardo D. and Jose D.,² then seven and eight years old respectively, were taken into custody.³ Another half-brother, two-year-old Willie G.,⁴ remained with his father. The Riverside County Department of Public Social Services (Department) filed a petition alleging under section 300, subdivisions (b), (g), and (j), that the children were at risk due to mother's substance abuse and physical abuse of the children, father's incarceration, and domestic violence between mother and father. The social worker stated in the detention report that father was incarcerated because of substance abuse problems and a parole violation. The report also stated that there were no shelter or foster homes available at which to place the children together, although "[t]he children appear to be very close and asked to be placed together."

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

² Father was not Ricardo and Jose's father.

³ Kimberly is the only subject of this appeal, and father is the only parent appealing.

In the jurisdiction/disposition report, the social worker stated that mother and father had joint legal custody to Kimberly, and father had primary physical custody. Jose's therapist stated that because of ongoing sibling rivalry between Jose and Ricardo, the two boys would not do well in placement together. Kimberly was diagnosed with asthma, and she had speech development delays that were being treated. The court sustained the petition and granted reunification services to parents.

In the status report for the six-month review hearing, the social worker reported that the children were all placed in separate foster homes. A previous attempt to place Kimberly with her brother had been unsuccessful because of "the constant fighting between them." Father was then employed as a truck driver and was participating in some of his case plan. Although Kimberly had previously had delay in speech development, she was then developmentally on track. Father had visited her occasionally, but she had eventually refused visits with him.

At a joint visit between mother and the children in May 2002, "[a]ll of the children appeared to be enjoying each other, laughing and playing." At another joint visit in August 2002, the children interacted well, but all three "seemed somewhat depressed." Another joint visit took place in September 2002, and the children generally interacted well "with the exception of some hurt feelings when one child did not want to play with the other."

[footnote continued from previous page]

⁴ Father was not Willie's father.

At the six-month review hearing, the court granted the parents six more months of reunification services. Joint visits between the children and mother continued. At one visit, “[t]he children played well with each other they were very hyper but appropriate [sic].” On one occasion when the social worker visited Kimberly while she was placed at an aunt’s house, the aunt stated that Kimberly had been urinating on the floor. The social worker asked Kimberly if “anyone touched her in her private area and she stated yes. She implicated her brother Jose who she stated stuck a rock in her private part, pointing to her vaginal area.” At another visit, “[t]he children cried through different portions of the visitation.”

In the status report for the 12-month review hearing, the social worker noted that Kimberly had recently been removed from a maternal aunt’s home and placed in a foster home because the aunt could not deal with her behavior. At the 12-month review hearing, the court terminated reunification services and referred the case to a section 366.26 hearing.

In a report filed in December 2003, the social worker recommended the permanent plans of legal guardianship for Jose, adoption for Kimberly, and a continuation of the hearing for 90 days to allow the Department to locate an adoptive home for Ricardo. The report stated that Kimberly appeared to be developmentally on track, and she had shown a good deal of improvement in school. Her current foster parents had expressed an interest in adopting her, and she had stated that she wanted to stay in their home and have them adopt her. She was scheduled to begin individual counseling, which the prospective adoptive mother had requested because Kimberly was becoming worried that the

adoptive parents would not follow through. Kimberly was having sleep difficulties and frequent nightmares.

Meanwhile, the children had bimonthly visits and maintained phone contact. They appeared to enjoy their time together, but tired after an hour together. The social worker stated, “Currently the children are not placed together, due to their behaviors. When together the children often fight and become overly physically aggressive.” Jose’s therapist had “suggested that the children not be placed together due to their difficult and challenging behaviors that each child exhibits when they are together.” In February 2004, a visit among all the children “appeared to go well.”

The social worker stated that no prospective adoptive family was willing to take all three children, but the social worker recommended that the children continue to have postadoption visits. The social worker stated that all the children’s current caretakers were willing to maintain the sibling relationship.

In a status review report in February 2004, the social worker reported that father was incarcerated for violating his parole and was awaiting sentencing after having been arrested for grand theft auto.

Kimberly had had five foster placements before her current one. She asked the prospective adoptive parents about her birth mother and brothers, and the prospective adoptive parents encouraged her to talk about her feelings. An April 2004 memorandum from a mediator to the trial court stated, “The caretakers of each of the minors in this case have established verbal visitation agreement for the siblings. The prospective adoptive parents of the minor Kimberly . . . have indicated an interest in exploring a post adoptive

contact contract with the careproviders of Kimberly's siblings as the case progresses. The careproviders of Ricardo . . . were unavailable this week to discuss a specific visitation agreement with the others to develop a written visitation agreement at this time."

At the section 366.26 hearing, Jose's attorney told the court that Jose objected to Kimberly's adoption, and Ricardo's attorney told the court that Ricardo would prefer a less restrictive permanent plan than adoption for Kimberly. Ricardo was concerned that he would be unable to have a relationship with her if parental rights were terminated. Ricardo's counsel stated that Kimberly's caretakers were not willing to enter a postadoption contact agreement, although they said they would continue visits with Ricardo. Ricardo's counsel requested that the court order permanent legal guardianship for Kimberly. Father's counsel expressed concerns about whether the children's relationships would continue if Kimberly were adopted. Father's counsel argued for a permanent legal guardianship for Kimberly.

The social worker's reports and Kimberly's counsel stated to the court that Kimberly was "very excited about being adopted by the current caretakers and consider[ed] these caretakers her mother and father." The prospective adoptive family was willing to continue sibling visitation, but did not wish to put anything in writing.

The juvenile court found (and father does not contest this finding) that Kimberly was likely to be adopted. The court also held that none of the exceptions in section 366.26, subdivision (c)(1) applied, and the court found that "adoption is in the best

interests of the child.” The court terminated father’s (and mother’s) parental rights in Kimberly. Father has appealed from this ruling.

DISCUSSION

“If the court finds a minor cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the minor under one of five specified exceptions. [Citations.]” (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) Father contends that the sibling exception to adoption under section 366.26, subdivision (c)(1)(E) applies to Kimberly’s case. That section permits the juvenile court to refuse to terminate parental rights to an adoptable child if the court finds that “[t]here would be substantial interference with a child’s sibling relationship”

The party claiming that one of those exceptions applies has the burden of establishing the applicability of the exception by a preponderance of the evidence. (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295.) “[T]he juvenile court does not have a sua sponte duty to determine whether an exception to adoption applies.” (*Ibid.*) A parent has standing at a section 366.26 hearing to argue that the sibling exception applies. (*In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1016.)

Factors that guide the court’s consideration of whether such a sibling relationship exists include: (1) “whether the child was raised with a sibling in the same home;” (2) “whether the child shared significant common experiences or has existing close and strong bonds with a sibling,” and (3) “whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of

legal permanence through adoption.” (§ 366.26, subd. (c)(1)(E).) The juvenile court’s finding that the sibling exception to adoption did not apply must be upheld if, viewing the evidence in the light most favorable to the court’s ruling, substantial evidence supports that ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.)

In *In re Daniel H.* (2002) 99 Cal.App.4th 804, the court stated, “The sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption. It only applies when the juvenile court determines that there is a ‘compelling reason’ for concluding that the termination of parental rights would be ‘detrimental’ to the child due to ‘substantial interference’ with a sibling relationship.” (*Id.* at p. 813.) The court may not prevent a child from being adopted because of the effect the adoption might have on a sibling; rather, the court must determine that adoption would be detrimental to the child whose welfare is being considered. (*In re Celine R.* (2003) 31 Cal.4th 45, 49-50.)

The burden of showing that the sibling relationship applies is not met lightly. For example, in *In re Megan S.* (2002) 104 Cal.App.4th 247, 251, the court held that even when it was undisputed that two sisters “are bonded and shared a home and common experiences,” the evidence did not show that severing the sibling relationship would cause detriment. The court explained that the parents had the burden to “obtain a psychological study or other evidence showing Megan would suffer detriment if separated from Stephanie.” (*Id.* at p. 252.)

Thus, the mere existence of a sibling relationship is not enough for the sibling exception to apply. (*In re Jacob S., supra*, 104 Cal.App.4th at 1017.) Rather, the court

must find both that (1) a significant sibling relationship exists and (2) severance of that relationship would be detrimental to the child. (*Ibid.*) In addition, the court must find that the benefits of continuing the relationship outweigh the benefits to be gained from the adoption. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th 942, 952-953 [holding that the sibling bond exception did not apply even though the siblings had lived together most of their lives, they “were very close,” they loved one another, and the sibling as to whom parental rights were being terminated would be sad and would miss her brother and worry about his safety if he lived with their mother].)

Similarly, in *In re Jacob S.*, *supra*, 104 Cal.App.4th 1011, the court noted that the evidence showed “strong sibling bonds” between two sisters, ages 11 and 14, who had lived together most of their lives and who had shared significant common experiences. The court also found that it was likely they would suffer detriment if they never saw each other again. (*Id.* at pp. 1017-1018.) The court nonetheless held that any such detriment would be outweighed by the benefits of adoption. (*Id.* at pp. 1018-1019.)

Here, the factors of the children’s common residence and common experiences do not strongly support application of the sibling exception to adoption. Ricardo had lived with his great-grandmother since he was one year old, and at one point Kimberly was in father’s primary physical custody under a family court order, although when the children were detained in February 2002, Kimberly was staying with mother at the maternal great-grandmother’s house because father was then incarcerated.

The social worker attempted to place the children together, but there were no shelter or foster homes available for sibling placement and no known relatives suitable

for placement. Kimberly and Ricardo were placed together, but the placement was unsuccessful because they fought constantly. Kimberly was then placed by herself in a foster home. At the beginning of the dependency, the children visited each other weekly with mother. Visits were later reduced to bimonthly and then monthly, and the children generally appeared to enjoy their time together. However, the showing in the present case was much less strong than that the court found insufficient to establish the sibling bond exception in *Jacob S.*

Here, moreover, as in *Jacob S.*, the benefit to Kimberly from adoption clearly outweighed any detriment she would suffer if the sibling relationship were terminated. During the dependency, Kimberly had been in five separate placements before being placed in the prospective adoptive home. The social worker reported that Kimberly was becoming increasingly concerned that the prospective adoptive parents would not follow through with adopting her, and she was having sleep disturbances and frequent nightmares. In January 2004, the social worker reported that Kimberly had bonded well with her prospective adoptive parents. She appeared to feel safe and comfortable in their home, and they were motivated to provide a safe and stable home for her. The court did not err in concluding that the permanency and stability of adoption were in Kimberly's best interest.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

WARD

J.

KING

J.